



FEDERAL ELECTION COMMISSION  
WASHINGTON, D C 20463

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COMMISSION  
SECRETARIAT

2005 SEP 20 P 4: 34

**SENSITIVE**

**VIA FEDERAL EXPRESS**

Craig Engle, Esq.  
Arent Fox PLLC  
1050 Connecticut Avenue, N.W.  
Suite 400  
Washington, DC 20036

Re: MUR 5648  
Broyhill for Congress and Tim Nerhood,  
in his official capacity as treasurer

Dear Mr. Engle:

On February 8, 2005, the Federal Election Commission found that there was reason to believe that your clients, Broyhill for Congress and Laney Orr, Jr.,<sup>1</sup> in his official capacity as treasurer, violated various provisions of the Federal Election Campaign Act, as amended, ("the Act") and instituted an investigation of this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that Broyhill for Congress and Tim Nerhood, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a-1(b)(1)(C), (D), and (E), and 11 C.F.R. §§ 400.21(b) and 400.22(b).

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief that you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

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<sup>1</sup> Tim Nerhood replaced Mr. Orr as treasurer on March 31, 2005.

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A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Adam Schwartz, the attorney assigned to this matter, at (202) 694-1341.

Sincerely,



Lawrence H. Norton  
General Counsel

Enclosure  
Brief

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2  
3 In the Matter of )

4 )  
5 Broyhill for Congress and Tim Nerhood, )  
6 in his official capacity as treasurer )  
7 )

MUR 5648

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9 **GENERAL COUNSEL'S BRIEF**

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11 **I. INTRODUCTION**

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13 On February 8, 2005, the Federal Election Commission ("Commission") found reason to  
14 believe that Broyhill for Congress and Laney Orr, Jr.,<sup>1</sup> in his official capacity as treasurer,  
15 violated several reporting requirements arising under the "millionaire's amendment" of the  
16 Bipartisan Campaign Finance Reform Act of 2002. Specifically, the Commission found that  
17 Broyhill for Congress and Laney Orr, Jr., in his official capacity as treasurer, violated: 1) 2  
18 U.S.C. § 441a-1(b)(1)(C) and 11 C.F.R. § 400.21(b) by failing to file the initial notification of  
19 expenditures of \$350,000 in personal funds; 2) 2 U.S.C. § 441a-1(b)(1)(D) and 11 C.F.R.  
20 § 400.22(b) by failing to file and failing to timely file multiple notifications of expenditures of  
21 additional personal funds; and 3) 2 U.S.C. § 441a-1(b)(1)(E) by failing to accurately report the  
22 total amount of personal funds Mr. Broyhill expended on the notifications of expenditures.

23 Based on the following factual and legal analysis, this Office is prepared to recommend  
24 that the Commission find probable cause to believe that Broyhill for Congress and Tim Nerhood,  
25 in his official capacity as treasurer, violated 2 U.S.C. §§ 441a-1(b)(1)(C), 441a-1(b)(1)(D), 441a-  
26 1(b)(1)(E) and 11 C.F.R. §§ 400.21(b) and 400.22(b), by failing to timely and accurately file  
27 multiple notifications of expenditures of personal funds.

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<sup>1</sup> Tim Nerhood replaced Mr. Orr as treasurer on March 31, 2005.

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1    **II.    SUMMARY OF FACTS**

2            J. Edgar Broyhill III declared his candidacy for the Republican nomination for North  
3    Carolina's Fifth District seat in the United States House of Representatives to the Federal  
4    Election Commission on July 22, 2003 by filing an FEC Form 2, Statement of Candidacy. As  
5    part of the Form 2, Mr. Broyhill declared his intention not to spend personal funds in excess of  
6    \$350,000 in the primary or general elections.

7            Mr. Broyhill began to spend personal funds on his campaign on July 1, 2003. On March  
8    1, 2004, Broyhill made a \$50,000 loan to Broyhill for Congress (the "Committee"), the  
9    authorized committee of Mr. Broyhill, increasing his total personal expenditures to \$376,500. By  
10    expending over \$350,000, the Committee was obligated to file with the Commission and with  
11    Mr. Broyhill's opponents an FEC Form 10, Notification of Expenditures from Personal Funds,  
12    within 24 hours of the threshold expenditure, or by March 2, 2004. *See* 2 U.S.C. § 441a-  
13    1(b)(1)(C). The Committee did not file a Form 10 with the Commission until March 12, 2004.  
14    Furthermore, the Form 10 filed by the Committee listed the total expenditures from personal  
15    funds as \$375,000. This figure omitted \$1,500 in contributions made by Mr. Broyhill in July  
16    2003.

17            In addition, the Committee untimely filed four additional FEC Form 10s regarding  
18    additional loans in excess of \$10,000 made by Broyhill to the Committee on March 12, 2004,  
19    April 30, 2004, June 8, 2004, and June 19, 2004, in the amounts of \$25,000, \$150,000, \$50,000,  
20    and \$50,000, respectively.<sup>2</sup> Each of these FEC Form 10s, as well as nine FEC Form 10s that

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<sup>2</sup> Respondents contend that each of these Form 10s were timely filed. In response to the reason to believe findings, they provided documentation regarding the March 12, 2004, April 30, 2004, and June 8, 2004, loans. The documentation purports to be evidence that the Committee properly filed the Form 10s with the Commission. Nevertheless, according to the computer generated facsimile and electronic mail receipt logs maintained by the

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1 were timely filed, also failed to take into account Broyhill's \$1,500 in contributions from the  
2 total amount of personal funds expenditures. Further, the Committee completely failed to file a  
3 Form 10 for a loan made on June 28, 2004, in the amount of \$90,000.<sup>3</sup>

4 **III. ANALYSIS**

5 When a candidate to the U.S. House of Representatives makes aggregate expenditures  
6 from personal funds of \$350,000 or more, the candidate or his or her authorized committee shall  
7 file a notification of the expenditure (FEC Form 10) within twenty-four hours of exceeding the  
8 threshold.<sup>4</sup> 2 U.S.C. § 441a-1(b)(1)(C); 11 C.F.R. § 400.21(b). For each additional expenditure  
9 of \$10,000 or more, the candidate or committee is required to file an additional notification  
10 within twenty-four hours. 2 U.S.C. § 441a-1(b)(1)(D); 11 C.F.R. § 400.22(b). These  
11 notifications must be filed with the Commission, each candidate in the same election, and the  
12 national party of each such candidate and must include, among other information, the date and  
13 amount of the expenditures and the total amount expended as of the date of the filing.<sup>5</sup> 2 U.S.C.  
14 §§ 441a-1(b)(1)(E) and (F); 11 C.F.R. § 400.23.

15 Mr. Broyhill's notification of personal spending over \$350,000 was not filed until ten  
16 days after it was due. Therefore, this Office recommends that the Commission find probable

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Information Division, the Commission did not receive these Form 10s, or the Form 10 regarding the June 19, 2004, loan in a timely manner. The Form 10s were later received twelve, thirty, five, and four days late, respectively.

<sup>3</sup> The Committee contends that the Form 10 regarding the June 28, 2004, loan was timely filed. The Committee has not provided any documentary evidence to support this assertion. To date, the Commission has yet to receive a Form 10 regarding the June 28, 2004, loan.

<sup>4</sup> An expenditure from personal funds includes direct contributions, an expenditure made by a candidate using personal funds, loans made by a candidate using personal funds, or a loan secured using such funds to the candidate's authorized committee. 2 U.S.C. § 441a-1(b)(1)(A).

<sup>5</sup> A candidate's personal expenditures could entitle his opponents to a threefold increase in the contribution limit under 2 U.S.C. § 441a(a)(1)(A) and a waiver of the limits on coordinated party expenditures under 2 U.S.C. § 441a(d). See 2 U.S.C. § 441a-1(a)(1).

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1 cause to believe that Broyhill for Congress and Tim Nerhood, in his official capacity as treasurer,  
2 violated 2 U.S.C. § 441a-1(b)(1)(C) and 11 C.F.R. § 400.21(b). In addition, as Mr. Broyhill  
3 continued to expend personal funds throughout the campaign, the Committee failed to file one  
4 Form 10 and untimely filed four additional Form 10s. Therefore, this Office recommends that  
5 the Commission find probable cause to believe that Broyhill for Congress and Tim Nerhood, in  
6 his official capacity as treasurer, violated 2 U.S.C. § 441a-1(b)(1)(D) and 11 C.F.R. § 400.22(b).

7 An additional violation occurred with respect to the contents of the Form 10s filed by the  
8 Committee. Each Form 10 filed with the Commission must include, among other information,  
9 "the total amount of expenditures from personal funds that the candidate has made, or obligated  
10 to make, with respect to an election as of the date of the expenditure that is the subject of the  
11 notification." 2 U.S.C. § 441a-1(b)(1)(E)(iii). In this instance, each of the fourteen Form 10s  
12 filed by the Committee omitted two contributions made by Mr. Broyhill totaling \$1,500 in July  
13 2003. Accordingly, this Office recommends that the Commission find probable cause to believe  
14 that Broyhill for Congress and Tim Nerhood, in his official capacity as treasurer, violated  
15 2 U.S.C. § 441a-1(b)(1)(E).

IV. RECOMMENDATION

1) Find probable cause to believe Broyhill for Congress and Tim Nerhood, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a-1(b)(1)(C), 441a-1(b)(1)(D), 441a-1(b)(1)(E) and 11 C.F.R. §§ 400.21(b) and 400.22(b).

Date

9/20/05

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